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IN THE
Supreme Court of the United States

No. 173

UNITED STATES and INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.

UNITED STATES SMELTING, REFINING & MIN-
ING COMPANY, DENVER & RIO GRANDE
WESTERN RAILROAD COMPANY, and UNION
PACIFIC RAILROAD COMPANY,

Appellees,

and

UNITED STATES and INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.

DENVER AND RIO GRANDE WESTERN RAIL-
ROAD COMPANY, UNION PACIFIC RAILROAD
COMPANY and AMERICAN SMELTING AND
REFINING COMPANY,

Appellees.

CONSOLIDATED CAUSES

**SUPPLEMENTAL MEMORANDUM FOR APPELLEES
IN UNITED STATES v. DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY, UNION PACIFIC
RAILROAD COMPANY, and AMERICAN SMELTING
AND REFINING COMPANY**

OTIS J. GIBSON,
ELMER B. COLLINS,
JOHN F. FINERTY,

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This supplemental memorandum will show:

(1) That it is not impracticable for the Commission in any case of alleged violation of Section 6 (7) of the Act to make a finding as to *whether or not* the line-haul rates include compensation for the terminal switching services in question.

(2) That this is not impracticable is shown by the fact the Commission has made such a finding in every report in connection with every order in the 74 supplemental proceedings which preceded the instant proceedings, the *American Smelting and Refining Company* case being the seventy-fifth, and *United States Smelting, Refining & Mining Company* being the seventy-sixth supplemental proceeding. Even in these two supplemental proceedings the Commission made such a finding in every report except in its respective reports in connection with its order here permanently enjoined.

(3) That the Commission in making such findings has never based them on any "cost study" of the line-haul rates, as counsel for the Commission suggested on argument of this case would be necessary here.

(4) That the Commission in every supplemental proceeding, except the two instant ones and except the *Corn Products* case, has based its finding as to whether the line-haul rates did or did not include compensation for terminal switching services *on the history of such rates*.

(5) That the suggestion made on argument that the Commission's order might be complied with by the carriers subsequently reducing the line-haul rates by the equivalent of the separate charge for terminal switching services, has already been considered and rejected by the majority of the Commission.

(6) That *on this record* the order of the Statutory Court should be affirmed. Such affirmance will not prevent the Commission from subsequently instituting proper proceedings either

(a) Under Section 6 (7), to require the appellee carriers to make charges *in addition* to their present line-haul rates for the terminal switching services involved, if after hearing it can be shown by evidence that such line-haul rates *do not in fact include compensation* for such terminal switching services; or

(b) Under Section 6 (1), merely to require segregation of the charges for line-haul and for terminal switching services without increase in the aggregate rates, if on hearing it can be shown by proper evidence that such segregation is practicable.

AS TO (1), (2), (3) AND (4) ABOVE:

On argument counsel for the Commission suggested that it would be impracticable to make a finding in these cases as to whether or not line-haul rates include compensation for terminal switching services, because such a finding would require an elaborate "cost study" of the line-haul rates.

The fact is that the Commission has made such a finding in every supplemental proceeding, including the instant proceedings, until it disclaimed any such finding in connection with its orders here permanently enjoined.

As shown by Appendix C to the brief of these appellees, such a finding was made in connection with every order which has been reviewed by this Court, and in every instance the Commission found that the line-haul rates *did*

not include compensation for the terminal switching services here involved.

There is, moreover, the record before this Court, though not printed, the original brief of the appellee industry before the Commission of November 1, 1944. In the Appendix to that brief are listed the Commission's reports in the seventy-four supplemental proceedings which preceded the two instant proceedings.* In every one of these proceedings the Commission made a finding, in one form or another, as to whether or not the line-haul rates included compensation for the terminal switching services. In ten of them the Commission found that the line-haul rates included compensation for some or all of the terminal switching services. In none of the supplemental orders there listed nor in those shown in Appendix C to appellees' brief before this Court, did the Commission base its finding on any "cost study". As shown in Appendix C, where the Commission found the line-haul rates did not include compensation, such findings were based on the history of the rates, which in every case, except the *Corn Products* case**, showed that *prior to receiving allowances* from the carriers the *respective industries* had always performed at *their own expense* the terminal switching services between established "interchange tracks" and actual points of loading and unloading. This is also referred to in the Commission's

*Such appendix shows that *all but seven* of these supplemental proceedings dealt with *payment of allowances* by the carriers to the industries for performance by the industries of the terminal switching services.

**In the *Corn Products* case, as shown in Appendix C, the tariffs did not expressly provide, as here, that the terminal switching services were included in the line-haul rates. Also, as there shown, the Commission found, and the Statutory Court sustained such finding as supported by the particular evidence of record, that the line-haul rates *did not include compensation* for the terminal services.

Basic Report, 209 I. C. C. 11, p. 44, where the Commission says:

"It is likewise urged that the line-haul rates have been fixed to compensate the carriers for the performance of spotting service, but our consideration of the service as here involved leads us to a different conclusion. Many of the industries which now receive allowances, or the performance by the carriers of the spotting service in lieu thereof, performed their own service without compensation or assistance for many years prior to the time they began receiving aid from the carriers, and at the time the change was made, the line-haul rates were not altered. In such cases the carriers simply assumed a burden not previously borne." (Italics supplied.)

As shown in Appendix B to the brief of these appellees, all terminal switching services since at least 1908 have always been performed by the appellee carriers under their line-haul rates, and the appellee industry has never performed any such terminal switching services at its expense or otherwise.

Moreover, as shown in appellees' brief, Point VII, pp. 70-76, neither the "plant yard" at Garfield nor the "flat yard" at Leadville have ever been points at which the appellee industry has received or delivered cars to or from the carriers, and such points have never been "interchange tracks" as between the industry and the carriers, but have been the only railroad terminal facilities of the carriers themselves.

The Commission's prior findings in connection with its order of October 14, 1946, which the Statutory Court temporarily enjoined (R. 42) that

"It is clear that the line-haul rates when first established did not include the expensive switching

performed at the smelter, and that they have not been increased since that time to include, and *do not now include* compensation for such services."

was simply made in utter disregard of this fundamental distinction between the history of the line-haul rates in these proceedings and the history of the line-haul rates involved in the Commission's orders in all prior proceedings. It was also, as shown under Point II of appellees' brief, made in complete disregard of the uncontradicted evidence of Mr. Williams, Mr. Carey and Mr. Tuckwood.

The Commission in disclaiming any findings in this respect in connection with its enjoined order merely undertook to avoid making the finding required by the record here, which finding would have made it clearly impossible to make its enjoined order.*

*In this connection, it is counsel's recollection that on argument, counsel for the Commission agreed with the suggestion of Mr. Justice Black that the following statement in the Commission's report of October 14, 1946 (R. 40) had reference to the Commission's conclusions in its Basic Report, rather than to the issues in the instant case: This statement reads as follows:

"One of the principal and important facts in issue in this proceeding is whether the line-haul rates included compensation for the switching services."

As shown by the paragraph of the report in which the foregoing statement was made, it was, in fact, made with reference to the contentions of the appellee industry on argument before the full Commission. Moreover, as shown at pp. 16-18 of appellees' brief, it was only after exceptions to the Examiner's report and two petitions for rehearing, that the appellees were able to get the majority of the Commission to recognize that this issue, and particularly the evidence relating to it, were important. As further noted, at pp. 27-28 of the appellees' brief, the majority of the Commission, nevertheless, did not hesitate in their report, on which their enjoined order is based, to stultify their previous recognition of the importance of this issue by undertaking in that report (R. 368) expressly to repudiate their prior findings on this issue in their report of October 14, 1946, and by expressly undertaking to make the order here enjoined without any findings whatever on "one of the principal and important facts in issue in this proceeding."

AS TO (5) ABOVE:

The suggestion that the Commission's enjoined order might be complied with by the carriers, subsequent to publishing terminal switching charges *in addition* to their present line-haul rates, reducing their line-haul rates by the equivalent of such separate switching charges, was originally made by Commissioner Miller in his dissent from the original report of Division 3 in these proceedings, of October 1, 1945 (R. 55-84, 85). As there shown, Commissioner Miller (R. 85), in stating that in his opinion *there was no contradiction in the record* of the evidence that the line-haul rates *do include compensation* for the terminal switching services, said:

"If we accept that contention as correct—and the record does not contradict it—it is my view that since we are here prohibiting the performance by respondents of such switching services without charge, *the line-haul rates should be adjusted so as to eliminate that part of such rates which was included as compensation for the intraplant switching.*"

In the first petition for rehearing of such report of the Commission, filed by the appellee industry (R. 215-255), it is stated (R. 242):

"Commissioner Miller's suggestion, however, that the dilemma in which the majority report places the Commission by its insistence that respondent carriers charge, and petitioner pay, terminal switching charges in addition to such line-haul rates, be solved by eliminating from the line-haul rates the compensation now contained in them for such terminal switching, is wholly impracticable. To determine exactly what part of each individual line-haul

rate from the innumerable producing points, here involved, represents compensation for such terminal switching, and to proportionately reduce each individual rate, would be an almost impossible task. What would be a fair apportionment of each line-haul rate, as between line-haul and terminal services, would differ in each instance. It would depend, among other things, upon the length of haul, the measure of the particular rate, and the difference in competitive factors which may affect each rate."*

It is to be noted that the majority of the Commission have never adopted Commissioner Miller's suggestion, primarily because it would not effect the real goal of all of the Commission's orders, that is to compel switching charges in addition to the line-haul rates, and perhaps, secondarily, because of the recognition that such suggestion was impracticable. The only basis for such a suggestion on this record is, as shown in appellees' brief, pp. 35-36, the unsuccessful attempt of counsel for the Commission and counsel for the United States, before the Statutory Court, to lead that Court to believe that this was the meaning both of the Commission's order of October 14, 1946 and of its order of May 18, 1948. As has been seen, that Court, by express findings in both instances, held that this was not the meaning of either order (Finding of Fact (5),

*These reasons why such segregation of the line-haul and switching charges is impracticable, are in addition to those suggested on argument, and also in the brief of the appellees, Public Service Commission of Utah and the State of Utah, p. 6, that it would be impracticable to have switching charges at each smelter vary with the actual value of each car of ores and concentrates, and that a flat switching charge would favor the high grade ores against the lower marginal ores, to such extent defeating the purpose of the line-haul "valuation" rates.

R. 300); (Finding of Fact (19), R. 459; Conclusion of Law (9), R. 462).

CONCLUSION

The Statutory Court, after exhaustive hearing, gave the Commission, by its remand in connection with its order of temporary injunction of November 14, 1947 (R. 300, 302), every opportunity to clarify its order by either (a) under Section 6(7) requiring the appellee carriers to make charges in addition to their present line-haul rates for the terminal switching services involved, if, after hearing, it could be shown by evidence that such line-haul rates *do not in fact include compensation* for such terminal switching services; or (b) under Section 6(1) plainly to require merely the segregation of the line-haul and switching charges without any increase of the line-haul rates.

As has been seen, the Commission, by its enjoined order, did neither. Affirming the order of the Statutory Court, moreover, will not preclude the Commission from yet adopting either alternative by the institution, if it desires, of a new investigation. Should the Commission elect to do this under Section 6(1), appellees would, however, insist on their right to a hearing to show by evidence that such segregation of the line-haul and terminal charges is impracticable.

Appellees respectfully submit that a failure to affirm the order of the Statutory Court, made only after a futile attempt to get the Commission to act pursuant to its statutory authority, would deprive appellees of the right, to

which they are entitled under the law, to judicial protection of their substantial rights.*

Respectfully submitted,

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JOHN F. FINERTY,
Counsel for Appellees.

*Appellees regret that it proved impossible to keep this Supplemental Memorandum within the five-page limit suggested in their request to the Court.